No. 5751

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

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Filed.....1929

.....Clerk.

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Brief of Appellant

This is an appeal from an order denying appellant's petition for the return of articles and property seized under a search warrant which had been quashed as invalid, and from a judgment of conviction and sentence of appellant for possession of intoxicating liquor.

THE FACTS

The evidence, upon which appellant was convicted, was procured by a search of appellant's residence at No. 34 North Benton in Helena, Montana (R. p. 62).

Mr. Herter, his wife, two daughters and the mother of Mrs. Herter were in the home and occupying it as such at the time of the search (R. p. 62).

The federal prohibition agents conducting the search were armed with a search warrant (R. pp. 18-21), regular on its face, issued at Great Falls, Montana, by Wilmer Jeannette, a United States Commissioner, residing in the city last named (R. pp. 25, 32, 36).

The search warrant was issued by said Commissioner upon the affidavit of one "B. M. Sharp" (R. pp. 23, 24). The affidavit alleges a "buy" stating that "on the 24th day of September, 1928" affiant "purchased a number of drinks of intoxicating liquor, to-wit: whiskey and beer, from Carl Herter and for which he paid the said Carl Herter at the rate of 25c per drink" (R. p. 23).

The search warrant was served in Helena, Montana, on Friday evening, Oct. 5th, 1928, at about 6 o'clock P. M. (R. p. 32) and six cases of beer, two gallons of whiskey and five gallons of wine were seized at appellant's home (R. pp. 21, 22, 32). No

copy of the affidavit of "B. M. Sharp" was delivered to appellant (R. p. 26).

On the following day, viz: Saturday, Oct. 6th, 1928, appellant retained counsel, residing in Helena, to represent him (R. p. 33).

On Monday morning following, viz., Oct. 8, 1928, appellant's counsel called Commissioner Jeannette at Great Falls, Montana,—requested a copy of the affidavit of said "B. M. Sharp,"—advised of counsel's employment by appellant, and requested the commissioner to retain in his possession the said search warrant and affidavit until counsel could prepare and file with the commissioner a motion to quash and affidavits in support thereof, to which the commissioner agreed (R. p. 37).

Immediately thereafter, said commissioner advised counsel by long distance telephone that the officers had made and filed their return on said search warrant with him on Saturday, Oct. 6, 1928, and that he had, that day, forwarded same and all papers connected therewith to the clerk of the U. S. District Court at Helena (R. p. 34).

Thereupon and on Monday, Oct. 8, 1928, counsel ascertained that said papers were that day filed in the office of said clerk and obtained therefrom a copy of the affidavit of said "B. M. Sharp" on which said search warrant was based (R. p. 38) which

affidavit was then and there read by appellant (R. p. 34).

Thereupon and on Tuesday, Oct. 9, 1928, appellant filed in the U. S. District Court his petition denying the allegations contained in said affidavit of "B. M. Sharp" and praying for the remission of said search warrant, affidavit and papers to the commissioner that issued said warrant and for leave to file a motion to quash said warrant and to controvert the grounds on which the warrant was issued pursuant to Section 625, Title 18, U. S. C. A. (R. pp. 25-30). This petition was supported by affidavits filed showing the above recited facts (R. pp. 31-40).

On Dec. 1, 1928, the Honorable Charles N. Pray, District Judge before whom said petition was pending, granted the relief prayed for and ordered the search warrant, affidavit, etc., remitted to the commissioner issuing said warrant and granted appellant leave to controvert, before said commissioner, the grounds on which said warrant was issued (R. pp. 40-41).

Thereafter appellant filed with said commissioner his petition to quash said search warrant and controverting the grounds on which it issued (R. p. 42). Hearing was originally set for Dec. 15, 1928, and upon request of the district attorney was con-

tinued to Jan. 5, 1929, when a hearing was had before said commissioner (R. p. 43).

Appellant caused a subpoena to be issued for said "B. M. Sharp" and delivered same to the U. S. marshal for service. The marshal was unable to locate "B. M. Sharp" and made his return to that effect. "B. M. Sharp" was not present at the hearing (R. p. 49).

Twelve witnesses gave testimony at the hearing before the commissioner in direct contradiction to the uncorroborated affidavit of "B. M. Sharp" (R. p. 49) and the commissioner thereupon on Jan. 17, made certain findings of fact and conclusions of law (R. pp. 42-50) and found that there was no probable cause for the issuance of said search warrant (R. p. 50).

The commissioner, accordingly, ordered that the search warrant be quashed,—that the evidence obtained thereunder be suppressed and that the liquor and articles seized thereunder be delivered to the District Court for such disposition as may be proper (R. p. 50).

The commissioner on Jan. 18, 1929, returned and filed said search warrant and all papers connected therewith to the Clerk of the District Court together with his report and a typewritten transcript of the

testimony of the witnesses properly subscribed (R. pp. 41-50).

In the meantime, and while the foregoing matters were pending, an information was filed charging appellant, in two counts, with violating the National Prohibition Act on Oct. 5, 1928, the date of the search (R. pp. 1-4).

On Jan. 21, 1929, appellant filed in the District Court a petition to restrain the district attorney and prohibition director from using in evidence the articles and information obtained in the above search of defendant's dwelling and for a return to him of all property taken under and by virtue of said search warrant (R. pp. 50-55).

The above petition was noticed for hearing for Jan. 24, 1929 (R. pp. 56, 57), but upon motion of the district attorney was "continued until the day of trial" (R. p. 4).

The above petition was made upon the files and records of the case and the proceedings had before the Honorable Charles N. Pray, District Judge, and before Commissioner Jeannette and upon the findings of fact, conclusions of law and orders made by said commissioner pursuant to Sections 625 and 626, Title 18, U. S. C. A. (R. p. 55).

Thereafter, on Jan. 29, 1929, the date of the trial, the above petition was presented to the court in ad-

vance of appellant's trial (R. pp. 57, 58). The petition was overruled and denied and exceptions taken (R. pp. 57-58).

Upon the government's calling its first witness appellant objected to the introduction of any evidence upon the grounds (a) that the search warrant, under which the search was made, had been ordered quashed, (b) that the search was illegal and (c) that there was no probable cause for the issuance of the warrant. This objection was overruled and exception taken (R. pp. 59, 60).

The four federal prohibition agents, who, on Oct. 5, 1928, conducted the search of appellant's residence under the aforesaid invalid search warrant, testified on behalf of the government. At the conclusion of the testimony of each, appellant moved that all such testimony be stricken. The motions were, by the court, denied and exceptions taken (R. pp. 61, 63, 64, 65, 66).

Appellant offered in evidence the order of Judge Pray dated Dec. 1, 1928 (R. pp. 40, 41) and the findings and conclusions of the commissioner issuing the warrant, made pursuant thereto, dated Jan. 17th (R. pp. 42-50). The trial court rejected this evidence, to which rulings appellant excepted (R. pp. 66, 67).

Appellant rested and moved to dismiss the first count charging possession upon the ground that there is no evidence of any sale, or, that the liquor was unlawfully possessed, or, that it was possessed for any purpose of violating the National Prohibition Act. The motion was denied and exception taken (R. p. 68).

Appellant requested the court to give six instructions, three of which apply to the first count of the information. The court gave none of the offered instructions (R. pp. 70, 73, 74).

The jury returned a verdict of guilty as to possession and not guilty on the nuisance charge (R. p. 7) and the court rendered its judgment of conviction on such verdict (R. pp. 8, 9).

This appeal is from the order denying appellant's petition for a return of the property seized, etc., and from the judgment so made and rendered (R. pp. 8, 9).

THE ISSUES

The questions involved are:

1. Can appellant's conviction be sustained upon the evidence herein, all of which was obtained by federal officers in executing a search warrant held by the commissioner issuing same to be invalid and by him ordered quashed?

2. Should articles and property seized and taken from appellant under an invalid search warrant be returned to him upon proper application made?

3. Were the remarks of the court to appellant's counsel during the course of the latter's argument to the jury prejudicial?

4. Was the court's charge to the jury relative to the law applicable to the possession count erroneous?

5. May appellant be convicted of unlawful possession of liquor in his home in the absence of any evidence of intent to violate the law by barter, sale, or transportation thereof?

ASSIGNMENT OF ERRORS

The District Court erred:

2. In denying defendant's said petition.

3. In overruling defendant's objection to the introduction of any evidence at the trial herein.

4. In denying defendant's motions to strike the testimony of the witnesses: (a) Paul Reed, (b) Orville Jones, (c) J. Q. Adams, and (d) Donald Dibble.

5. In sustaining the government's objection to the introduction, in evidence, of the commissioner's findings of fact and conclusions of law relative to the absence of probable cause for the issuance of the search warrant herein.

6. In denying the defendant's motion to dismiss the first count of the information herein.

7. During the course of defendant's argument to the jury and when counsel said: "Section 33 of the National Prohibition Act says that it shall not be unlawful for one to possess intoxicating liquor in his private dwelling . . . ."

To remark:

"Provided he had it before prohibition went into effect. That is the law. Do not try to go outside of the law."

8. During the course of defendant's argument to the jury to remark: "The Court has admonished you to refrain from that line of argument. You better heed the admonition."

9. In failing and refusing to give to the jury defendant's offered Instruction No. 1.

10. In failing and refusing to give to the jury defendant's offered Instruction No. 2.

11. In failing and refusing to give to the jury defendant's offered Instruction No. 6.

12. To charge the jury as follows: "The National Prohibition Act says when it is made to appear that liquor was found in possession that the presumption is that it was unlawful possession and the presumption must be overcome or the jury must find, namely, the possession is unlawful. There is no lawful possession of liquor even in a private residence unless it was owned by the private party before

prohibition went into effect. One section is that those who had possession before prohibition went into effect did not need to report it to the Commissioner of Revenue, or whatever officer it was that was looking after *for* it, and he may still keep that liquor for himself or for his own guests, meaning the liquor that he owned before prohibition went into effect, and, if liquor is found it must be made to appear to the satisfaction of the jury that it was not in his possession unlawfully."

13. To charge the jury as follows: "The evidence is it was unlawful, moonshine and other liquors—the presumption is it was unlawful; in fact, he possessed it and the reputation of the place is it is a place where liquor is kept and sold."

14. In sustaining the government's objection to the introduction in evidence of the order made on December 1, 1928, by the Hon. Chas. N. Pray, District Judge, remitting the search warrant herein to the commissioner issuing the same for further proceedings and granting defendant leave to controvert the grounds on which said warrant was issued.

15. In holding that the search of defendant's private dwelling was legal.

16. There is no evidence, lawfully obtained, to sustain the verdict.

17. The verdict is against the law.

18. It was error to give and render judgment against the defendant on such verdict.

ARGUMENT

Appellant, pursuant to Sections 625 and 626, Title 18, U. S. C. A., challenged, before the commissioner issuing the search warrant, the truth of the statements contained in the affidavit of "B. M. Sharp" upon which affidavit the warrant was issued.

See:

U. S. v. Madden, 297 Fed. 679
Cogen v. U. S., 278 U. S. 226, 49 S. Ct. 120, 73 L. Ed. 158
U. S. v. Ephraim, 8 F. (2d) 512
U. S. v. McKay, 2 F. (2d) 257
In re Oryell, 28 F. (2d) 639
Cost v. U. S., 27 F. (2d) 511.

Pursuant to the above sections and in conformity to an order made by District Judge Charles N. Pray herein (R. pp. 40, 41), the commissioner proceeded to take testimony in relation to appellant's motion to controvert and after hearing had, found there was no probable cause for the issuance of the search warrant and ordered it quashed (R. p. 50).

Although reviewable (*Atlanta Enterprise v. Crawford*, 22 F. (2d) 834), no exception was saved nor appeal taken from the findings and order of the commissioner.

See:

Perlman v. U. S., 247 U. S. 7, 13, 38 S. Ct. 417, 62 L. Ed. 950

As was said in Pappas v. Lufkin, 17 F. (2d) 988, at p. 991,

> "In this circuit it has recently been held that the determiantion of the commissioner as to the existence of probable cause is conclusive, unless clearly arbitrary."

In United States v. Ephraim, (D. C.), 8 F. (2d) 512, the court said:

> "I have heretofore consistently ruled that I would not review the decision of a commissioner upon a pure question of fact. I think a commissioner, in determining questions of fact tending to show probable cause, acts in a judicial capacity, and that his acts, in so far as they involve questions of fact, are not reviewable by the court. They may be reviewed on questions of law. * * * *
>
> "The claimant or person from whom the property is seized is given a day in court, the warrant in the first instance being issued ex parte, and has a right to the independent judgment of the commissioner issuing the warrant if desired. The judge, who may be called upon later to try offenders from whom the seizure was made, cannot substitute his judgment on a question of fact so raised for that of the commissioner.
>
> "However, the question before the commissioner should be raised by appropriate proceeding. It can be raised only by the person from whom the property is taken or the owner thereof in a proceeding seeking to quash the search warrant."

In United States v. McKay, (D. C.), 2 F. (2d) 257, at p. 260, the court said:

> "The only officer who is authorized under Sections 15 and 16 to take testimony in relation

to the grounds on which the search warrant is issued is the judge or commissioner who originally issued the warrant.

"I find nothing in the statute which authorizes such an investigation by the District Court."

The commissioner's findings determined the illegality of the search warrant. These findings may not be arbitrarily disregarded.

See:

In Re Oryell, 28 F. (2d) 639
United States v. Elliott, 3 F. (2d) 496

The trial judge was without authority to circumvent the commissioner's findings made pursuant to an order of another judge of the same court and based upon the undisputed testimony of numerous witnesses (R. p. 43).

See:

Gardener v. U. S. (C. C. A. 9th), 13 F. (2d) 851
Hardy v. North Butte Mining Co. (C. C. A. 9th), 22 F. (2d) 62

It should not have been necessary for appellant to have filed a petition in the District Court to restrain the use of the evidence obtained under the illegal search warrant for the reason that the commissioner's return had already been filed in court and the district judge should have taken judicial notice thereof.

The search warrant having been determined invalid, appellant was entitled to the restoration of the

articles and property wrongfully taken from his possession by virtue of such warrant.

See:

Sec. 626, Title 18, U. S. C. A.
Fabri v. U. S. (C. C. A. 9th), 24 F. (2d) 185
Kohler v. United States (C. C. A. 9th), 9 F. (2d) 23
U. S. v. Madden, 297 Fed. 679
Brock v. U. S. (C. C. A. 8th), 12 F. (2d) 370
Honeycutt v. U. S. (C. C. A. 4th), 277 Fed. 939
Berkelhammer v. Potter (C. C. A. 1st), 23 F. (2d) 375 at p. 377.

In Cogen v. United States, 278 U. S. 226, 49 S. Ct. 120, 73 L. Ed. 158, the Supreme Court, referring to Section 626, Title 18, U. S. C. A., *supra*, said:

> "Congress made specific provision, by an independent proceeding, for the vacation of a warrant wrongfully issued and *for the return of the property.*" (Italics ours.)

Search Warrant Held Invalid

Assignments Nos. 2, 3, 4, 5, 6, 14, 15, 16, 17, 18

There is no intimation that the commissioner acted arbitrarily or that his findings are not supported by the facts. The commissioner's authority to act pursuant to the order of Judge Pray and Sections 625 and 626, Title 18, U. S. C. A., cannot be questioned. Hence it must follow that prejudicial error was committed by the trial court (a) in denying appellant's petition for restoration of the property seized; (b) in admitting over objection the evidence obtained

through the use of the invalid search warrant; (c) in denying appellant's motions to strike the testimony of the federal officers who conducted the illegal search; (d) in excluding the commissioner's findings and conclusions when offered in evidence; (e) in denying appellant's motion to dismiss as to the count charging unlawful possession; (f) in excluding the order made by Judge Pray authorizing appellant to file his motion to controvert with the commissioner and ordering the search warrant proceeding remitted for that purpose; (g) in holding the search made under the invalid search warrant as legal, and, (h) in permitting the rendition of a verdict and judgment on the evidence so obtained being covered by appellant's assignments of error Nos. 2, 3, 4, 5, 6, 14, 15, 16, 17 and 18.

Remarks of the Court

Assignments Nos. 7 and 8

This court in Fabri v. U. S., 24 F. (2d) 185 at p. 186 said with regard to the possession of liquor in a private dwelling:

> "Possession there may be lawful or unlawful, depending upon the mode of acquisition or the intended use."

The Supreme Court in U. S. v. Berkeness, 275 U. S. 149, 48 S. Ct. 46, said:

> "Congress was careful to declare in the National Prohibition Act that mere possession of liquor in one's home 'shall not be unlawful'."

In Castro v. U. S., (C. C. A. 1st), 23 F. (2d) 263, the court said:

> "The possession of liquor in a private dwelling is not prima facie evidence that it is kept for an unlawful purpose. It is only when it is possessed elsewhere than in a private dwelling and without a permit, that its possession is prima facie evidence that it is kept unlawfully, Section 33, Title 2, first clause?"

In Geraghty v. Potter, 5 F. (2d) 366, the court said:

> "Section 33 of the act expressly declares that it shall not be unlawful to possess liquor in one's private dwelling, and to throw the burden of proving that such possession is lawful comes near depriving the possessor of his presumption of innocence, but possession elsewhere is, under the act, deemed to be prima facie unlawful."

In United States v. Kelley, (D. C.), 26 F. (2d) 717, the court said:

> "Under the provisions of Section 33 of the act, the possession of liquor in one's private dwelling for personal use is lawful."

Again in the same case:

> "The effect of the use of the words 'by him' and 'his' in Section 33 is to make possession in a private dwelling lawful as to any one except the person who is occupying and using the dwelling for other purposes than as a dwelling."

In the Petition of Shoemaker, (D. C.), 9 F. (2d) 170, the court said with reference to Section 33 of the Prohibition Act:

> "This is a rule of evidence, to be applied by the court under proper instructions to the jury on the trial of a case involving the alleged possession of liquor. This section recognizes, as other provisions of the Volstead Act do, that this becomes a matter of ultimate proof; that if the finding is that the liquors were kept for the purpose of being sold, bartered, or otherwise disposed of in violation of the law, then the possession would be illegal; otherwise, the possession would be legal. This is a question of fact, to be solved by a jury under the facts and the legal rules of evidence."

Has the trial court the power to delete Section 33 from the Prohibition Act?

Has counsel not the right, in defending one charged with the unlawful possession of liquors in his dwelling, to comment on the distinction made by Congress, by the Supreme Court, by Circuit Courts and by learned district judges, between lawful and unlawful possession?

Counsel, when interrupted by the court (R. p. 69), was correctly quoting from Section 33 of the National Prohibition Act. The trial court stated in the presence of the jury that this particular section says that it shall not be unlawful for one to possess intoxicating liquors in his own private dwelling,

"Provided he had it before prohibition went into effect" (R. p. 69).

Section 33 *supra* contains no such provision and the trial court had no right to so advise the jury.

The words of the act, as counsel was about to say, are:

> "Provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein." (Sec. 50, Title 27, U. S. C. A.)

Counsel was quoting the section and not misquoting it. The jury might have well been led to believe that counsel was doing the latter when the court remarked:

> "The Court has admonished you to refrain from that line of argument. You better heed the admonition." (R. p. 69.)

The remark of the court first quoted was an erroneous statement of the law of possession and misleading to the jury. We submit that there was nothing in counsel's argument to occasion or justify the last quoted remark of the court. Each remark was prejudicial to appellant, being covered by assignments of error Nos. 7 and 8.

Instructions Refused

Assignments Nos. 9, 10, 11

The authority for appellant's offered Instruction No. 1 (R. pp. 73, 74), are:

Petition of Shoemaker, (D. C.), 9 F. (2d) 170
Fabri v. U. S., (C. C. A. 9th), 24 F. (2d) 185 at p. 186

Appellant's offered Instruction No. 2 (R. p. 74) is based upon the following authorities, viz:

Lyles v. State, 268 Pac. 999
Petition of Shoemaker, 9 F. (2d) 170

Offered Instruction No. 6(R. p. 74) is based upon the second sentence of Section 33 of the National Prohibition Act (Sec. 50, Title 27, U. S. C. A.)

The refusal to give these instructions or any, in substance, like them, is covered by Assignments Nos. 9, 10 and 11.

Possession Not Unlawful

Assignments Nos. 17 *and* 18

There is no evidence in the record "that the liquors were kept for the purpose of being sold, bartered, or otherwise disposed of in violation of the law" (*Petition of Shoemaker*, 9 F. (2d) 170), hence the verdict of guilty is against the law and the judgment rendered on such verdict is erroneous, being covered by Assignments Nos. 17 and 18.

Charge to Jury

Assignments Nos. 12 *and* 13

As is hereinbefore stated, possession of liquor in one's private dwelling may be lawful or it may be unlawful. The court's charge to the jury fails to

so state. It likewise fails to advise the jury under what circumstances the appellant's possession may be considered lawful. Clearly it was error for the court to charge the jury that:

> "There is no lawful possession of liquor even in a private residence unless it was owned by the private party before prohibition went into effect." (R. p. 71.)

Again it was error to charge the jury that:

> "The presumption is that it was unlawful possession and the presumption must be overcome or the jury must find, namely, the possession is unlawful." (R. p. 71.)

See:

Sec. 50, Title 27, U. S. C. A.
United States v. Kelly, 26 F. (2d) 717
Castro v. U. S., (C. C. A. 1st), 23 F. (2d) 263
Street v. Lincoln Safe Deposit Co., 254 U. S. 88
Petition of Shoemaker, 9 F. (2d) 170

The above are covered by assignments of error Nos. 12 and 13.

For the reasons above, the cause should be reversed.

Respectfully submitted,

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